No. 2744.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION

APPELLANT

VS.

GEORGE B. BURKE AND E. W. FERRIS, AS ADMINISTRATOR OF THE ESTATE OF DAVID L. KELLY, DECEASED

APPELLEES

BRIEF OF APPELLEES

GEORGE B. BURKE AND E. W. FERRIS

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

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THE FRANKLIN PRESS, PRINTERS, PORTLAND

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UNITED STATES FIDELITY & GUARANTY COMPANY, a Corporation,

Appellant,

vs.

GEORGE B. BURKE and E. W. FERRIS, as Administrator of the Estate of DAVID L. KELLY, Deceased, and MOUNTAIN TIMBER COMPANY, a Corporation,

Appellees.

Brief of George B. Burke and E. W. Ferris, as Administrator, etc., Appellees.

STATEMENT OF FACTS.

This suit was brought by appellees, Burke and Ferris, to foreclose a mortgage given by Mountain Timber Company, to secure certain promissory notes executed by Mountain Timber Company, for the sum of $32,500.00. These notes, and the mortgage given to secure the same, were dated February 3rd, 1910, and bore interest at the rate of 5 per cent per annum. There were two notes, each for the sum of $16,250.00. One

matured February 3rd, 1911, and the other matured February 3rd, 1912. This suit was commenced in April, 1913. No part of the notes, either principal or interest, had been paid.

These notes were secured by a mortgage upon a tract of timber land in Cowlitz County, in the State of Washington.

The mortgage contained the following provisions:

> "Provided that said mortgagor, company, hereby covenants and agrees to and with the said D. L. Kelly and his assigns, that any timber cut by said Mountain Timber Company, or its assigns, on any of the above described lands before full satisfaction and payment of this mortgage shall be paid for to said D. L. Kelly, or his assigns, at or before the time of cutting the same, at the rate of $2.50 per thousand feet, according to the log scale or cruise made by a cruiser or scaler selected and agreed upon by the parties hereto, and the payments so made shall apply upon the amount due upon this mortgage." (p. 4, Trs.)

In the complaint it was, among other things, alleged, in substance, that the chief value of the mortgaged premises, was the merchantable timber standing thereon; that the defendant had cut a large amount of timber from the premises, without complying with the above quoted provisions of the mortgage, and without making any payment whatever on account thereof; that

at the time of the commencement of the suit, the defendant was engaged in cutting and removing timber from the land; and threatens to, and will continue to cut and remove large quantities of timber from said premises unless restrained by the court, thus lessening and endangering the mortgage security; and unless enjoined by the court, defendant will cut and remove so much of the timber as to greatly impair, if not wholly destroy, the mortgage security aforesaid, etc. Complainants prayed for a temporary injunction, as well as a permanent injunction, against the further cutting of timber and consequent impairment of the security. (pp. 4 and 5, Trs.)

Immediately after the suit was commenced, a motion was made for a temporary injunction, supported by the bill of complaint, and the affidavit of F. G. Kelly (pp. 5, 6, 7 and 8, Trs.). The motion coming on to be heard on May 5th, 1913, the parties entered into a stipulation which recited that this suit had been commenced; that application had been made for a temporary injunction, etc., and then proceeded as follows:

> "And Whereas, the defendant has this 5th day of May, 1913, filed in this court and cause, a bond in the sum of $45,000.00, with the United States Fidelity & Guaranty Company, as surety thereon, conditioned for the payment in full of any judgment which may be rendered in favor of the plaintiff in this action; Now, Therefore, in consideration of the

filing of said bond, it is hereby stipulated and agreed:

First—That plaintiff's application for an injunction be, and the same is hereby withdrawn" (p. 9, Trs.).

Contemporaneously with the signing and filing of said stipulation, there was filed in the cause, a bond executed by Mountain Timber Company, and by the Appellant, U. S. Fidelity & Guaranty Company (p. 10, Trs.). This bond was filed to prevent the issuance of a temporary injunction, and to secure to the defendant, liberty to further impair and convert to its own use the security of the mortgage. In a sense, it was designed to stand in lieu of the security. In substance the surety contracted to stand with defendant in the suit and assume the whole obligation of and pay any judgment that might be recovered in the case against the principal. This is the construction given to the bond by learned counsel for appellant, who say at page 23 of their brief:

"The principal-defendant, the Mountain Timber Company, of course, signed the bond along with the appellant-surety, but that bond was an agreement to pay any judgment which might be rendered in the cause, etc."

In consideration of the filing of the bond, the application for a temporary injunction was withdrawn. A

brief history of these matters is contained in the supplemental complaint, portions of which are printed in the Transcript (pp. 12, 13, 14, Trs.).

On June 15th, 1915, Judge Cushman, before whom the cause was tried, filed an opinion which contained the following:

> "The mortgage provided that any timber cut by defendant upon the mortgaged premises before full satisfaction of the mortgage, should be paid for at the rate of $2.50 per thousand feet, at or before the time of cutting the same. There was no attempt to comply with this provision, before or after the making of these tenders, although a large amount of timber was cut and removed from the land. At the commencement of the suit, complainant Burke asked an injunction against further cutting of timber in such manner. To avoid the issuance of such injunction, the defendant, with the United States Fidelity & Guaranty Company as surety, executed a bond to the complainant Burke, in the amount of $45,000.00, conditioned to pay any judgment executed herein." (P. 14, Trans.)

Findings and decree were ordered in favor of the complainant.

Proposed Findings of Fact, Conclusions of Law and Decree, were prepared and served upon the defendant. The defendant, and U. S. Fidelity & Guaranty Com-

pany, appellant, were notified in writing on July 2d, 1915, that on July 6th, 1915, complainants would move for the signing and entering of the Findings of Fact, Conclusions of Law and Decree, so prepared and served, not only against Mountain Timber Company, but against said U. S. Fidelity & Guaranty Company (pp. 14, 15, 16 and 17, Trs.).

In the proposed Findings, which were subsequently signed and entered, the court, among other things, found, in accordance with the allegations of the complaint, that the mortgaged premises at the time of the execution of the mortgage were covered with standing merchantable timber, which constituted the principal value of the security; that the mortgage contained a provision requiring the defendant to pay $2.50 per thousand feet for timber cut, to be applied upon the mortgage; that since the execution of the mortgage, the defendant cut and removed from the land a very large amount timber; that it had failed to perform the covenant in the mortgage above referred to; that it had not paid any sums whatsoever upon the mortgage debt, according to said covenant, or otherwise; that in the complaint, and likewise in the supplemental complaint, a temporary injunction was prayed for against the further cutting of the timber; that immediately after the suit was commenced, application was made upon the files, and supporting affidavits, for a temporary injunction; that a hearing was had upon said application; and, in connection with said hearing, and in consideration that the plaintiff would withdraw his application

for a temporary injunction, the defendant, as principal, and the appellant, as surety, duly executed and filed with the Clerk of this Court the bond, etc.

The court further found in substance, that, at the time of the commencement of the suit, and at the time of the application for a temporary injunction, and the execution of the bond, the defendant was engaged in cutting and removing the merchantable timber from the mortgaged premises; that there was still a large amount of timber thereon; that in consideration of the execution of the bond, the plaintiff did not seek to obtain a temporary writ of injunction, and the defendant was permitted to continue to cut and remove timber from the mortgaged premises; that after the execution of the bond, the defendant cut and removed a large quantity of timber from the mortgaged premises, and thus further diminished and impaired the security of the mortgage debt in a substantial amount, and that practically all the merchantable timber has been removed.

In the proposed conclusions of law the court found that plaintiffs were entitled to judgment against the defendant, Mountain Timber Company, and the United States Fidelity & Guaranty Company, for the full amount due, with costs and attorney fees, directed the entry of judgment of foreclosure and sale; directed that the proceeds of the sale be applied in satisfaction of the costs, disbursements and the mortgage; and provided that execution should issue against the defendant and the United States Fidelity & Guaranty Company for any deficiency (pp. 18, 19, 20 and 21, Trs.).

The proposed decree, which was subsequently entered, gave judgment in accordance with the conclusions of law, and the prayer contained in the complaint, and among other things provided,

> "That the proceeds of said sale, or so much thereof as may be necessary shall be applied to the payment of the amount hereinbefore adjudged and decreed to be due to the plaintiffs and that plaintiffs may have general execution against any of the property of said defendant Mountain Timber Company and the said United States Fidelity & Guaranty Company for any deficiency remaining after the application upon said judgment of the proceeds of said sale" (pp. 28, 29 and 30, Trs.).

These proposed Findings, Conclusions and Decree, were all served sometime prior to their presentation to the court, and both the defendant, Mountain Timber Company, and the United States Fidelity & Guaranty Company, were notified in writing that, at the time and place specified in the notice, a motion would be made for the entry of such Findings, Conclusions and Decree. Neither defendant nor appellant appeared at the time and place stated in the notice, nor made any objection to the said findings, conclusions or decree, or the entry thereof. Appellant made no question in the District Court as to the propriety of the practice followed in entering judgment against it, made no motion or objection in that court; sought no ruling and took no exception to any proceeding therein; never suggested to the

District Court any lack of jurisdiction, or asked that court to purge its records of, what appellant now contends to be a void judgment. The decree was entered July 6, 1915. This appeal was filed January 3, 1916, or six months, lacking three days from date of decree; ample time to have suggested to the trial court any alleged defect, or irregularities resulting in disadvantage to appellant.

There is but a single assignment of error (pp. 22, 23, Trans.), and the precise point of the error assigned is thus stated:

> "The error alleged refers only to so much of said decree as affects the U. S. Fidelity & Guaranty Company and the claim of error is based on the contention that the U. S. Fidelity & Guaranty Company was not a party to the suit, and that the said court had no jurisdiction in said cause to render the said judgment and decree, or any judgment or decree whatsoever against the said U. S. Fidelity & Guaranty Company."

There are no assignments or specifications of error in the brief. The only matter which has any semblance to an assignment of error is the following contained in the statement of facts:

> "Upon the ground that the entry of this judgment against the U. S. Fidelity & Guaranty Company was unauthorized, said company perfected this

> appeal and now urges said lack of authority, in addition to plain errors manifest upon the face of the record, as ground for a reversal of said judgment in so far as the same concerns this appellant."

Many questions are discussed in the brief of appellant, as to the form of the judgment entered, the propriety of the practice followed by the District Court, the true construction of the judgment entered, etc. These questions, while perhaps having an academic interest, are hardly pertinent to the single question here presented for review by assignment, viz.: Was the appellant a stranger to the cause so that the District Court was wholly without jurisdiction to render any judgment or decree against it upon notice or otherwise?

However, when we come to our argument we will analyze, discuss and controvert the contentions advanced by counsel for appellant, and in the order in which they appear in their brief.

POINTS AND AUTHORITIES.

I.

ERRORS NOT ASSIGNED ACCORDING TO RULE 11 OF THIS COURT WILL BE DISREGARDED.

Lloyd v. Chapman, 93 Fed. 599.

Savings & Loan Society v. Davidson, 97 Fed. 697-702.

II.

QUESTIONS NOT RAISED IN THE TRIAL COURT WILL NOT BE NOTICED, OR REVIEWED, ON APPEAL.

2 Cyc. 666; 667; 680.

III.

STATE LAWS AND DECISIONS RELATING TO MORTGAGES, THE MANNER OF THEIR ENFORCEMENT, AND THE RESPECTIVE RIGHTS AND OBLIGATIONS OF THE PARTIES, ARE RULES OF PROPERTY WHICH WILL BE GIVEN EFFECT BY THE FEDERAL COURTS.

Clark v. Reyburn, 8 Wall. 318; 19 Law. Ed. 354.

Brine v. Hartford Insurance Co., 96 U. S. 627; 24 Law. Ed. 858.

Bendey v. Townsend 109 U. S. 665; 27 Law. Ed. 1065.

IV.

THE DECREE ENTERED IN THIS CASE COMPLIED IN FORM, AND IN SUBSTANCE, WITH THE LAWS OF WASHINGTON AND THE DECISIONS OF THE SUPREME COURT OF THAT STATE.

Pierce's Code, Secs. 1275, 1277, 1284 and 1286; B. C. 5886, 5888, 5880 and 5889; R. & B. Anno. C. & Stat. 1117, 1114, 1119 and 1120.

Shumway v. Orchard, 12 Wash. 104; 40 Pac. 634.

Rogers v. Turner, 19 Wash. 399; 53 Pac. 663.

State ex rel v. Superior Court, 34 Wash. 643; 76 Pac. 282.

Fuller & Co. v. Hull, 19 Wash. 400; 53 Pac. 666.

Bradley Engr. Co. v. Muzzy, 54 Wash. 227; 103 Pac. 37.

V.

AND THE DECREE AS ENTERED COMPLIED IN FORM, AND IN SUBSTANCE, WITH THE REQUIREMENTS OF EQUITY RULE 10, AND THE PRACTICE APPROVED BY THIS COURT, AND BY FEDERAL COURTS GENERALLY.

Equity Rule 10.

Seattle L. S. & E. Ry. Co. v. Union Trust Co. 79 Fed. 179. (Ninth C. C. A.)

Perry v. Tacoma Mill Co., 152 Fed. 115. (Ninth C. C. A.)

VI.

THE BOND EXECUTED BY APPELLANT WAS IN EFFECT AN AGREEMENT TO PAY ANY JUDGMENT THAT MIGHT BE RENDERED IN THE CAUSE, AND ITS LIABILITY BECAME FIXED WHEN THE LIABILITY OF THE PRINCIPAL WAS FIXED.

Oelrichs v. Williams, 15 Wall. 211; 21 Law. Ed. 43-44.

Washington Ice Co. v. Webster, 125 U. S. 426-446; 31 Law Ed. 799-807.

Moses v. United States, 166 U. S. 600; 41 Law. Ed. 1130.

Cyclone, etc., Plow Co. v. Vulcan Iron Works, 52 Fed. 923-4.

VII.

WHEN APPELLANT EXECUTED THE BOND FILED IN THIS CAUSE, IT BECAME A PARTY TO THE CAUSE. THENCEFORTH THE COURT HAD JURISDICTION OVER THE APPELLANT, AND WHEN THE LIABILITY OF THE PRINCIPAL WAS FIXED THE COURT HAD AUTHORITY UPON SUMMARY APPLICATION TO ENTER LIKE JUDGMENT, OR DECREE, AGAINST THE SURETY AS AGAINST THE PRINCIPAL.

Russell v. Farley, 105 U. S. 433; 23 Law. Ed. 1060.

Brown v. N. W. Life Ins. Co. 119 Fed. 149.

s. c. Woolworth v. N. W. Life Ins. Co., 185 U. S. 354; 46 Law. Ed. 945.

Tyler, Etc., Mining Co. v. Last Chance Mining Co., 90 Fed. 15. (Ninth C. C. A.)

Gordon v. Third National Bank, 56 Fed. 790.

Empire State, Etc., Co. v. Hanley, 136 Fed. 99-103 (Ninth C. C. A.).

Perry v. Tacoma Mill Co., 152 Fed. 115 (Ninth C. C. A.).

Cimiotti Unhairing Co. v. American Fur Refining Co. 158 Fed. 171-174.

McCloskey v. Barr, 79 Fed. 408.

Coosaw Mining Co. v. Farmers Mining Co., 51 Fed. 107.

Third National Bank v. Gordon, 53 Fed. 471.

Sharp v. Schmidt & Zeigler, 62 Tex. 263.

Corbett v. Pond, 10 App. D. C. 17-28.

Hathaway v. Weeks, 34 Mich. 237-244.

Council v. Averett, 90 N. C. 168.

Smith v. Wilson, 18 Tex. Civ. App. 24; 44 S. W. 556.

Black v. Caruthers, 4 Humph. (25 Tenn.) 87.

Wanters v. Van Horst, 28 N. J. Eq., 104 (1 Stew.).

Easton v. N. Y. Etc., Ry. Co., 30 N. J. Eq. 238 (3 Stew.).

Fears v. Riley, 147 Mo. 453-6.

ARGUMENT.

I.

ERRORS NOT ASSIGNED PURSUANT TO RULE 11 WILL BE DISREGARDED—BUT A SINGLE ASSIGNMENT, THAT BECAUSE APPELLANT NOT A PARTY THE COURT HAD NO JURISDICTION.

The only assignment of error filed in connection with this appeal is stated in these words:

> "The error alleged refers only to so much of said decree as affects the U. S. Fidelity & Guaranty Company, and the claim of error is based on the contention that the U. S. Fidelity & Guaranty Company was not a party to the suit, and that the said court had no jurisdiction in said cause to render the said judgment or decree, or any judgment or decree whatsoever against the said U. S. Fidelity & Guaranty Company."

The following is quoted from Rule 11 of this Court:

> "The plaintiff in error, or appellant, shall file with the Clerk of the Court below with his petition for the writ of error or appeal an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged."

1. If it be conceded that this assignment of error

is sufficient to present any question to this Court for review, clearly it presents no question other than that the Court had no jurisdiction to enter judgment against the appellant for the reason that appellant was not a party to the cause. That is the only point that can be said to be asserted with any degree of particularity. There is no assignment which challenges the correctness, or propriety, of any ruling, or proceeding, of the trial court during the progress of the case up to, and including the entry of decree. The filing of assignment of errors is an essential condition to the granting of a writ of error, or the allowance of an appeal. Errors not assigned according to Rule 11 will be disregarded. Of course, the Court may notice a plain error not assigned, but that is optional with the court, and does not flow as consequence from any right of the appellant, or any act, or omission, on its part.

Lloyd v. Chapman, 93 Fed. 599 (9th Circuit).
Savings & Loan Society v. Davidson, 97 Fed. 696-702 (9th Circuit).

The brief of the appellant contains no sufficient specification of errors, but merely includes in the statement of facts, a general recital to the effect that the entry of judgment against the appellant was unauthorized and that in addition, there are other plain errors manifest on the face of the record. This is in disregard of Rule 24 of this Court (sub-div. "b"), but even if it were otherwise, and exceptions were presented in the brief not

contained in the original assignments of error, they would be unavailing.

In Lloyd v. Chapman, 93 Fed. 600, this Court said:

"The filing of an assignment of errors is thus made an essential condition to the granting of a writ of error or the allowance of an appeal, and its purpose has been many times stated by the Courts. In Doe v. Mining Co., 17 C. C. A. 196, 70 Fed. 456, this court said its purpose is "to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court"; and, further, that "the attempt to make the assignment of errors more particular in a brief is not proper." "It is in fact," said the court, "an attempt to amend the record in this particular without the permission of court." In McFarlane v. Golling, 22 C. C. A. 23, 24, 76 Fed. 24, the Circuit Court of Appeals for the Seventh Circuit said:

'The requirement of rule 11 (11 C. C. A. cii., 47 Fed. vi), that the assignment of errors shall be filed 'with clerk of the court below, with the petition for the writ of error or appeal,' was designed to bring into the record at that time a separate and particular statement of each error asserted and intended to be urged; and to a large extent the rule is a nullity if, under general and indefinite specifications like those quoted, the ap-

> pellant may be able afterwards to bring forward objections to the decree or judgment, which, when error was assigned, had not been thought of.'

"In Dufour v. Lang, 4 C. C. A. 663, 54 Fed. 913, the Court said":

> 'The purpose of the rule is two-fold—to advise the adversary as to what he has to defend, and to aid the appellate court in reviewing the cause." (p. 600)

2. It thus appears that, assuming appellant has properly assigned any error, it is that appellant was not a party to the cause and hence the District Court had no jurisdiction to enter any judgment against it. Counsel for appellant discuss a number of questions having no relation to the assigned error. Indeed, the major portion of their brief is directed to the question whether the trial court had authority to enter decree for the mortgage debt against the mortgagor, or any decree for deficiency, until after the sale of the mortgaged property and the application of the proceeds of the sale to the payment of the mortgaged debt; and to the further question as to the true scope and meaning of the decree entered. These matters are all far beyond the scope of the error assigned. They do not relate to the matter of jurisdiction over the person of the appellant. They

amount to nothing more than a complaint that the trial court departed from customary equity practice, disregarded equity rules and committed some judicial error in the form of the decree entered and the manner of its entry. While these complaints are in fact without merit, none of them go to the matter of jurisdiction over the person. They, in effect, merely assert that the trial court, in the exercise of its power and jurisdiction, committed error during the progress of the case. But error committed in the exercise of jurisdiction and during the progress of a cause, to be reviewable here, must be the subject of a motion, request or objection in the trial court upon the part of the complaining party, there must be a ruling with respect thereto, or a refusal to rule, there must be an exception duly noted, and such error must be properly assigned and properly presented to this court. Nothing of that kind appears in the record here presented.

3. If, however, appellant wishes to insist upon being heard with respect to the matters discussed in the brief, other than that appertaining to jurisdiction over its person, it must do so at the expense of waiving the jurisdictional question. A party may attack a judgment for a lack of jurisdiction over the person, without such attack per se, having the effect of a general appearance, but whenever a party attacks a judgment for lack of jurisdiction over the person, and for other reasons, such as error committed upon the trial, such party thereby enters a general appearance and waives objection to

jurisdiction over the person. There is manifest inconsistency in a party asserting that the court never had any jurisdiction over his person; that there never was any trial; and that no judgment within the purview of the law was ever entered, and at the same time insisting that, during the progress of the trial and in the exercise of its power and jurisdiction, the court committed error. If the appellant has properly assigned error, other than that going to the question of jurisdiction over the person, and has thus obtained the right to be heard upon such other matters, clearly it constitutes a waiver of the jurisdictional question, and the cause must then be disposed of as though the court had jurisdiction over the person of appellant; in which event the only matters for the consideration of this court would be those appertaining to alleged errors committed during the progress of the trial.

II.

THE DECREE PROPER IN FORM AND SUBSTANCE; COMPLIES WITH LAWS AND DECISIONS OF WASHINGTON; CONFORMS TO EQUITY RULE 10 AND TO PRACTICE APPROVED BY THIS COURT. NO PERTINENT ASSIGNMENT OF ERROR—FORM OF DECREE NOT JURISDICTIONAL.

The first contention advanced by counsel for appellant is, in substance, that in a suit to foreclose, the Court cannot, in advance of sale, render judgment for the full

amount due, but that its power is limited to ascertaining the amount due and directing sale of the mortgaged property and the entry of any personal decree for deficiency, or otherwise, must be after sale. This objection of course has to do with the form of the decree rendered. It is a matter not properly before the court by assignment of error, and appellant is in no position to have such a question reviewed, while insisting that the court had no jurisdiction over its person. It is elementary that, in order to urge error occurring during the progress of a trial up to and including the entry of judgment or decree, the party must first concede the jurisdiction of the court over the person and subject matter. If the court entered a decree containing provisions which it should not have contained, that was but an erroneous exercise of judicial power over person, or subject matter, of which the court had jurisdiction, and correction of such errors upon appeal must be first preceded by proper objections, and exceptions, in the trial court and proper assignments here. All of these elements are absent. However, the contention that the decree was not proper in form in ascertaining the amount due upon the notes and mortgage debt, giving judgment for this amount, directing the sale of the land and the application of the proceeds to the debt, and authorizing execution for any deficiency, is wholly without merit. In support of their contention counsel cite a number of decisions by state courts and two or three decisions of the Supreme Court of the United States. The former decisions will not be reviewed or commented upon. If state laws and decisions furnish controlling precedents to the

Federal Courts sitting in equity within the respective states, then this question is settled adversely to appellant by the laws of Washington and the decisions of its highest court construing and applying them. Shortly we will refer to and point out the palpable inapplicability of the United States Supreme Court decisions cited by the appellant. The numerous citations of state laws, and text books of practice, written around these decisions, and the quotations from the opinions of state courts, plainly indicate that counsel for appellant entertain the view that state laws and state decisions may be of controlling force in regulating the mode of entering a judgment of foreclosure, the character of the judgment entered, and the rights and obligations thereby conferred, or imposed, upon the parties to the litigation.

1. State laws and state decisions are, in many instances, rules of property which must be respected and given effect by the Federal Courts, and these courts must regulate and modify their practice so as to give full force and effect to such laws. There is not a very well defined line of demarkation, in the adjudicated cases, between those laws, or decisions, classified as rules of practice and not controlling upon Federal Courts, and those classified as rules of property which must be given effect. In the instant case, the defendant executed two notes secured by a mortgage and likewise covenanted to pay the debt. These contracts were enforceable in, and were enforced in the State of Washington. The laws of Washington existing at the time these contracts

were entered into, and were enforced, of course, became a part of the contracts themselves, and conferred certain definite legal rights upon the complainant with respect to the form of decree that should be entered therein, the rights which followed the entry of the decree, and the mutual rights and obligations of the parties to the litigation thereafter. It may be fairly urged that these statutory provisions, which will be hereafter set out, are not mere rules of practice which may be disregarded by the Federal Courts, but are rules of property to which the Federal Court is bound to give full effect. It has been repeatedly held by the Supreme Court of the United States, and by the subordinate Federal Courts, that a mortgage is a conveyance; that its construction and its operation are determined by the laws of the state where given and enforced; that it appertainsto real property, its incumbering and alienation, and that a Federal Court when called upon to enforce contracts of this character, must give full force and effect to the terms of the instrument, and the laws of the state, as well as the decisions of the highest court of the state where the contract is enforced.

In Clark v. Reyburn, 8 Wall. 318, 19 Law. Ed. 354, a mortgage foreclosure suit, the court had before it the construction of a mortgage, the rights conferred upon the mortgagee by the terms of the instrument, and the statutes of the state, and the character of the decree to be entered. Among other things, the court said:

"In this country the proceeding in most of the

states, and perhaps in all of them, is regulated by statute. The remedy thus provided when the mortgage is executed enters into the convention of the parties in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law impairing the obligation of the contract within the meaning of the provision of the constitution upon the subject."

Brine v. Hartford Insurance Company, 96 U. S. 627, 24 Law. Ed. 858, a mortgage foreclosure case, discusses at length the question here involved and reviews the prior adjudications of the Supreme Court. It was there contended that various provisions of the Illinois statute, with respect to the character of the decree to be entered, the manner of sale, and the rights of the parties after sale, were rules of practice, not rules of property, and the Federal court sitting in equity might disregard them. After stating this contention the Court proceeds:

"On the other hand, it is said that the effect of the sale and conveyance made by the commissioner is to transfer the title of real estate from one person to another, and that all the means by which the title to real property is transferred whether by deed, by will, or by judicial proceeding, are subject to and may be governed by the legislative will of the State in which it lies, except where the law of the State on that subject impairs the obligation of a contract.

And that all the laws of a state existing at the time a mortgage or any other contract is made which affect the rights of the parties to the contract, enter into and become a part of it, and are obligatory on all courts which assume to give remedy on such contracts.

"We are of the opinion that the propositions last mentioned are sound; and if they are in conflict with the general doctrine of the exemption from state control of the chancery practice of the Federal Courts, as regards mere modes of procedure, they are of paramount force, and the latter must to that extent give way. It would seem that no argument is necessary to establish the proposition, that when substantial rights, resting upon a statute, which is clearly within the legislative power, come in conflict with mere forms and modes of procedure in the courts, the latter must give way, and adapt themselves to the forms necessary to give effect to such rights. The flexibility of chancery methods, by which it molds its decrees so as to give appropriate relief in all cases within its jurisdiction, enables it to do this without violence to principle. If one or the other must give way, good sense unhesitatingly requires that justice and postive rights, founded both on valid statutes and valid contracts, should not be sacraficed to mere questions of mode and form.

* * * * * * * * *

"Nor is it pretended that this court or any other Federal Court can, in such case, review a decree of the state court which gives the right to redeem. This is a clear recognition that nothing in that statute is in conflict with any law of the United States. If this be so, how can a court, whose functions rest solely in powers conferred by the United States, administer a different law which is in conflict with the right in question? To do so is at once to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other, with no superior to decide which is right, Olcott v. Bynum, 17 Wall. 44 (84 U. S. XXI, 570); Ex parte McNiel, 13 Wall. 236 (80 U. S. XX, 624)." (861-2.)

* * * * * * * * *

"We are not insensibe to the fact that the industry of counsel has been rewarded by finding cases even in this court in which the proposition that the rules of practice of the Federal Courts in suits in equity cannot be controlled by the laws of the States, is expressed in terms so emphatic and so general as to seem to justify the inference here urged upon us. But we do not find that it has been decided in any case that this principle has been carried so far as to deny to a party in those courts substantial rights conferred by the statute of a State, or to add to or take from a contract that which

is made a part of it, by the law of the State, except where the law impairs the obligation of a contract previously made. And we are of opinion that Chief Justice Taney expressed truly the sentiment of the court as it was organized in the case of Bronson v. Kinzie, as it is organized now, and as the law of the case is, when he said that 'All future contracts would be subject to such provisions, and they would be obligatory upon the parties in the courts of the United States as well as those of the Stataes.' " (pp. 862-3.)

In Bendey v. Townsend, 109 U. S. 665; 27 Law. Ed. 1065, a mortgage foreclosure case, the court said:

"The land is in Michigan, the notes and mortgage were made and payable in Michigan; and by the law of Michigan, as settled by repeated and uniform decisions of the Supreme Court of that State, a stipulation in a mortgage to pay an attorney's or solicitor's fee of a fixed sum is unlawful and void, and cannot be enforced in a foreclosure, either under the statutes of the State, or by bill in equity. Bullock v. Taylor, 39 Mich. 137; Meyer v. Hart, 40 Mich. 517; Vosburgh v. Lay, 45 Mich. 455; Van Marter v. McMillan 39 Mich. 304; Botsford v. Botsford, 49 Mich 29. Upon such a question, affecting the validity and effect of a contract made and to be performed in Michigan, concerning land in Michigan, the law of the State must goven

in proceedings to enforce the contract in a Federal Court held within the State. Brine v. Ins. Co. 96 U. S. 627 (XXIV, 858); Ins. Co. v. Cushman (ante 648); Equator Co. v. Hall (ante 114)." (p. 1066.)

2. We quote now certain provisions of the laws of the State of Washington in force when the notes and mortgage involved in this suit were executed and which since then have continued in force.

"When there is no express agreement in the mortgage nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged."

(Pierce 's Code Sec. 1275; B. C. 5886; R. & B. Anno. Code & Stat. 1117.)

"When there is an express agreement for the payment of the sum of money contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and the costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor."

(Pierce's Code, 1277; B. C. 5888; R. & B. Anno. C. & Stat. 1119.)

"The mortgagee or holder of the lien may proceed upon his mortgage or lien; if there be a separate obligation in writing to pay the same, secured by said mortgage or lien, he may bring suit upon such separate promise. When he proceeds on the mortgage, if there be a specific agreement therein contained for the payment of a certain sum, or there is a separate obligation for the said sum, in addition to a decree of sale of mortgaged property, judgment shall be rendered for the amount due upon said mortgage or other instrument, the payment of which is thereby secured. The decree shall direct the sale of the mortgaged property, and if the proceeds of said sale be insufficient under the execution, the sheriff is authorized to levy upon and sell other property of the mortgage debtor, not exempt from execution, for the sum remaining unsatisfied.

(Pierce's Code 1284; B. C. 5880; R. & B. Anno. C & Stat. 1114.)

"Judgments over for any deficiency remaining unsatisfied after the application of the proceeds of sale of mortgaged property, either real or personal, shall be similar in all respects to other judgments for the recovery of money, and may be made a lien

upon the property of a judgment debtor as other judgments, and the collections thereof enforced in the same manner."

(Pierce's Code 1286; B. C. 5889; R. & B. Anno. C & Stat. 1120.)

Construing these code provisions the Supreme Court of Washington has held that, in a foreclosure suit, where there is contained in the mortgage an express agreement to pay the mortgage debt, or such an agreement is contained in a separate instrument, such as a note, the plaintiff has the legal right to have personal decree entered against the mortgagor, as a part of the decree foreclosing the mortgage and directing the sale of the mortgaged property. This, of couse, is a very substantial right.

Shumway v. Orchard, 12 Wn. 104; 40 Pac. 634.
Rogers v. Turner, 19 Wash. 399; 53 Pac. 663.
State Ex rel v. Superior Court, 34 Wash. 643; 76 Pac. 282.

And the same court has held that the judgment against the mortgage debtor becomes a lien upon his general property as soon as it is entered, among other things, saying:

"It is next urged that a judgment against mortgagors, rendered in a decree of foreclosure, does

not become a lien upon the general property of the judgment debtors until after the mortgaged premises are exhausted, and then only in the event that there is a deficiency. This position is not well taken. Hays v. Miller, 1 Wash. Ter. 143. Shumway v. Orchard, 12 Wash. 104; 40 Pac. 634."

Fuller & Co. v. Hull, 19 Wash. 400; 53 Pac. 666.

The foregoing code provisions, as construed by the cases cited, have not been modified by subsequent legislation. Bradley Engineering Co. v. Mussy, 54 Wash. 227; 103 Pac. 37.

These statutory provisions are not mere rules of practice. They are rules of property. They confer definite and valuable rights which should be given full recognition by the Federal Court sitting within the state, and to that end the court should modify and conform its modes of practice and procedure so that in the decree entered the complainant would be given such relief, and be protected in such rights, as his contract and the laws of the state guarantee to him. The decree entered in the case at bar gave substantial effect to these state laws and state decisions. And we will now undertake to show that the decree in form is in accord with the practice approved by the Federal Courts, particularly this court, independently of any statute and by virtue of the Equity Rules.

3. The decree entered in the present case, violates

no Federal rule of practice, and is not in conflict with the mode of procedure usually followed. We have already stated that it would not be profitable to review, or comment upon, the decisions of the state courts touching the contentions of appellant now under discussion, for the reason that if state laws and the state decisions are pertinent, the laws and decisions of the State of Washington directly support the decree in the form entered. There are cited by counsel, however, the following decisions of the Supreme Court of the United States, viz.:

Dodge v. Freedman, 106 U. S. 445; 27 L. Ed. 206.
Noonan v. Braley, 2 Black, 499; 17 L. Ed. 278.
Orchard v. Hughes, 1 Wall. 73; 17 L. Ed. 560.

The Dodge case, supra, merely involved the construction of section 808, Revised Statutes, relating to the District of Columbia; it briefly states that the statute applied to foreclosure of deeds of trust, and that the decree entered conformed to its provisions.

The Noonan case (1862), supra, holds that in the absence of a rule of the Supreme Court, the trial court erred in entering a personal decree against the mortgagor, as a part of the decree which foreclosed the mortgage and directed a sale of the property. Up to that time no rule had been promulgated. There is a general statement to the effect that the practice of federal

courts, sitting in equity, are regulated entirely by rules promulgated by the Supreme Court. No state statute, or rule announced by a state supreme court, was involved.

The Orchard case, supra, decided a year or two later, was ruled by the Noonan case.

In 1864, the Supreme Court promulgated a rule, then numbered 92, which, in substance, appears as rule 10, in the rules of practice promulgated by the Supreme Court, November 4th, 1912. It is as follows:

> "In suits for the foreclosure of mortgages, or the enforcement of other liens, a decree may be rendered for any balance that may be found due to the plaintiff over and above the proceeds of the sale or sales; and execution may issue for the collection of the same, as is provided in rule 8, when the decree is solely for the payment of money."

In Seattle L. S. & E. Ry. Co. v. Union Trust Company, 79 Fed. 179, decision by Judge Ross, concurred in by Judge Gilbert and Judge Hawley, this court seems to have had before it the precise objection made here to the form of the decree entered. We have not a copy of the decree in that case before us, and inasmuch as the decision of the trial court does not seem to have been reported, the text of the decree is not available. It was a mortgage foreclosure, and we assume that the

assignments of error correctly indicate the character of the decree. We quote from the assignments of error on page 185:

> "(9) The court erred in finding, in and by said decree, that $5,558,000 was the total principal due on said outstanding bonds at the date of the rendition of the decree."

> "(12) The court erred in ordering, adjudging, and decreeing herein that this defendant pay or cause to be paid to the complainant, on or before the 3rd day of February, 1896, the sum of $5,558,-000, together with the interest found to be due by the terms of said decree, as hereinbefore stated."

> "(17) The court erred in ordering, adjudging, and decreeing herein that this defendant is personally liable for, and shall pay to the complainant, the amount of any deficiency, with interest thereon, which may remain due after the sale of the properties of this defendant under the terms of said mortgage, and the application of the proceeds thereof, pursuant to the terms of said decree."

It will be observed that the decree assailed on that appeal conformed substantially to the requirements of the laws of Washington. The applicability of these laws was evidently not urged, or considered. This court disposes of these assignments of error as follows:

"The third point made on behalf of the appellant is answered by the ninety-second equity rule prescribed by the Supreme Court for the government of the courts of equity of the United States. It is as follows:

> "In suits in equity for the foreclosure of mortgages in the Circuit Courts of the United States, or in any court of the territories having jurisdiction of the same, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same, as is provided in the eighth rule of this court regulating the equity practice, where the decree is solely for the payment of money." Insurance Co. v. Keith, 23 C. C. A. 196, 77 Fed. 374.

"By the terms of the decree appealed from, the deficiency judgment provided for is not for the benefit of the complainant, but is in favor of the complainant as trustee. The amount of such deficiency, like the amount realized by the sale of the mortgaged property, after deducting costs et cetera, is to be paid to the bondholders according to their respective interests. A special prayer for a judgment for such deficiency as may be found to exist, while proper and the better practice, is not absolutely essential. Under the prayer for general relief

which the amended bill contained, such judgment may be given."

4. In concluding, our discussion on this phase of the case, we might again remark that the objection made goes to the form of the decree, and not to the jurisdiction of the court over the person, or subject-matter. If we understand aright the position of appellant, and interpret correctly the language of the single assignment of error, it is, that appellant was not a party to the cause, hence the trial court had no jurisdiction over its person. It necessarily follows that, if the appellant wishes to reserve this point, he cannot be heard to challenge mere errors, or irregularities in practice. If the appellant was a party to the case and made seasonable objection to the form of the decree entered, had an exception duly noted, and had properly assigned the action of the court as error, it might be in position to have such question reviewed. If the court had no jurisdiction of appellant, then appellant is not concerned with any errors or irregularities during the progress of the trial, or in the making up of the decree, as to its form. If the court had jurisdiction of appellant, then it is not in position to complain of the form of the decree, because it made no objection thereto in the trial court, reserved no exceptions, and has not here assigned as error any irregularities in form, or practice, or any departure from the rules prescribed by the Supreme Court.

III.

APPELLANT'S ARGUMENT DEFEATS ITS RIGHT OF APPEAL—COUNSEL COMPLAINS OF FORM OF DECREE.

The second contention advanced by appellant in its order in the brief filed (Point II) embraces two distinct propositions, viz.:

(a) The judgment being beyond the power of the court to enter, in the form entered, must be construed to be a mere ascertainment of the amount due from the mortgagor and as a necessary step in the foreclosure; and

(b) That a fair interpretation of the language of the bond covers the payment of a deficiency judgment only, as that is the only kind of a judgment which could be lawfully rendered.

1. The first point refers to the form of the decree and is merely another way of stating the contention advanced under Point I, which we have heretofore discussed, to the effect that no deficiency judgment could be provided for, ordered or decreed in the foreclosure suit in advance of sale. But appellant advances from the unsound premise that the decree in form was defective, and was not in compliance with the equity rules, to the satisfying conclusion that, properly construed, the de-

cree is merely in effect the ascertainment of the amount due upon the mortgage debt as a step in the foreclosure suit. (pp. 5-6, App. Brief.)

Now the decree against the appellant is no broader than that against its principal, the Mountain Timber Company. Indeed, the decree against both is but a single decree, the language applying to each alike. Counsel have demonstrated to their own satisfaction that the court had no power to enter any decree which would impose a personal liability upon either the principal or the surety; that no personal liability for a deficiency or otherwise, could be declared, provided for, or decreed until after sale of the property; that the power of the court was limited to a decree merely ascertaining the amount of the mortgage debt and directing foreclosure; that in fact properly construed, this is all that the decree means; that construed in the light of the powers of the trial court, and the rules of construction announced by the Supreme Court of the United States, the decree does not impose any personal liability upon either the mortgagor, or the appellant, but merely in effect states the amount due and directs a sale. And if all this be true, of what does appellant complain? Surely it cannot complain of or appeal from a mere ascertainment of the amount of the mortgage debt with direction that the mortgage premises be sold. Given the construction, which counsel insists is beyond doubt the true one, the decree is wholly innocuous so far as anybody and everything is concerned, except the mortgaged property. Why then the appeal? Is it merely to have this court

approve the construction insisted upon by appellant? Counsel say that their contention is fully supported by the Supreme Court of the United States. And if this be so, why go elsewhere merely to have their views confirmed. The argument proves too much. It defeats the right of appeal entirely, because if the decree entered is in effect merely an ascertainment of the amount due, it is not a final decree, and no final decree has as yet been entered. It is not sufficient for appellant to say that the trial court may permit the unauthorized issuance of an execution. It is not to be presumed that the trial court will do an unlawful act, or direct one to be done, and until there is some overt judicial act to the injury of appellant there is nothing of which complaint can be made in this court. And according to the argument of counsel, nothing as yet has been done to the prejudice of appellant. It is conceded that the decree as construed by counsel, a construction which they insist is too clearly and palpably right to be open to debate, is within the undoubted powers of the trial court, imposes no liability upon the appellant, and works no injury upon it. Counsel say that the language is so broad that the credit of appellant may be impaired. If counsel think that the inadvertent use of terms too broad in the decree may be of detriment to the appellant, the orderly and appropriate method of securing relief would have been to apply to the trial court. This court does not sit to correct mere verbal inaccuracies. Indeed, this argument in its ultimate effect upon the right of appellant to maintain its appeal is somewhat akin to the further contention that the judgment is wholly void because appellant was not a

party, hence no judgment. On the one hand it is insisted that no judgment has in fact been entered, and what the court has done has been merely to ascertain the amount due, and that no other construction of the decree is admissible. Upon this theory there never has been any judgment entered against the appellant. Upon the other hand, it is contended and indeed, both contentions are advanced indiscriminately upon the same pages, that a judgment has been entered which imposes upon appellant, not only liability for any deficiency remaining after the sale of the mortgage premises but liability for the full amount found to be due. Of course both contentions cannot be true. As a matter of fact, both are unsound.

But it may be interesting to note that, as the argument that no personal judgment has yet been entered defeats the appeal, so the argument that the judgment is wholly void upon its face because appellant was not a party to the cause would seem likewise to defeat the right of appeal. It was said by the Supreme Court of Indiana in Backer v. Eble, 144 Ind. 287; 43 N. E. 233.

> "A judgment rendered in vacation is void. Where a judgment is void because rendered in vacation, no appeal lies therefrom."

And the Court concluded its opinion thus:

> "Appellant's contention having been established that no judgment has been rendered in this case, it follows that their appeal must be, and is, dismissed."

And in Staab v. Atl. & P. R. Co., 3 New Mex. 349; 9 Pac. 381, the court held that nisi prius judges had no power to sit in vacation for the purpose of rendering final judgments at law and that in the case under consideration "The proceedings in the lower court being void there is no final judgment, hence the case is still pending in that court," and the appeal was dismissed. And in Lawther v. Agee, 34 Mo. 372, the Court held that if a party had not availed himself of a motion in the lower court to have an alleged void judgment set aside he could not appeal. And in Herman v. Martin, 21 Ky. Law 1396, and Piper v. Johnson, 12 Minn. 60, it was held that where a party alleging a judgment to be void moved in the lower court for an order setting it aside which was denied, he might then appeal from the judgment and from the order refusing to set it aside.

Taken at their full value the arguments advanced by counsel for appellant, what is complained of are certain alleged verbal inaccuracies in the decree actually entered, never called to the attention of the court, or made the basis of any motion, request, ruling, or exception, or assignment of error here. While we do not concede the soundness of any of these contentions, they have been analyzed merely for the purpose of showing that, if the views of appellant are sound, the result has been to demonstrate beyond all dispute that the appeal should be dismissed, and to demonstrate nothing else.

2. The second contention under this head, viz., that

the language of the bond covers only the payment of a deficiency judgment, since that is the only kind of judgment which could be lawfully entered, will now be briefly discussed. This question is not of much practical importance because that is the effect of the decree as entered. The decree directed the sale of the mortgaged property and the application of the proceeds of the sale to the payment of the expenses and the mortgage debt, and provided for issuance of execution as to any deficiency remaining after the application of the proceeds of the sale. So that the character, and the extent, of the liability actually imposed upon the appellant is exactly that conceded to be within the fair interpretation of the bond.

In effect the bond bound the appellant to pay any judgment that might be rendered in the cause. The following is the language of counsel for appellant stating their interpretation of the instrument:

> "That bond was an agreement to pay any judgment that might be rendered in the cause."
> (App. Brief, p. 23.)

The appellant did not contract with respect to any particular form of judgment or decree. It is not concerned with the form of the decree entered, or the propriety of the action of the court in entering it. Whatever decree was entered against its principal bound it. The liability of the principal as determined by the de-

cree entered was the liability of the appellant, and that liability became fixed upon the entry of the decree, and the character and the scope of the liability were unalterably settled by the decree. Appellant cannot be heard to say that the court committed some error during the progress of the trial, or erroneously construed the equity rules promulgated by the Supreme Court, or disregarded any of the usual methods of procedure in making up the decree. They do not concern, or affect, the liability of appellant because its contract was to pay any judgment which might be rendered in the cause.

Oelrichs v. Williams, 15 Wall. 211; 21 Law Ed. 43-44.

Washington Ice Co. v. Webster, 125 U. S. 426-446; 31 Law Ed. 799-807.

Moses v. U. S., 166 U. S. 600, 41 Law Ed. 1130.

Cyclone, etc. Plow Co. v. Vulcan Iron Works, 52 Fed. 923, 924.

IV.

APPELLANT BECAME A PARTY TO SUIT UPON EXECUTING AND FILING BOND. IT CONTRACTED TO PAY ANY JUDGMENT ENTERED. SUMMARY JUDGMENT ENTERED AFTER NOTICE AUTHORIZED — NOTICE SUFFICIENT — ALLEGED DEFEATS NOT ASSIGNED AS ERROR, AND NOT JURISDICTIONAL.

We come now to the question of the jurisdiction of the court over the person of appellant. Briefly summarized, our contention is: that by the act of signing the bond, filed in the progress of the cause, the appellant thereby made itself a party to the record, assumed a liability co-extensive with that of the principal; and that, having ascertained the character and extent of the liability of the principal, the court summarily, and upon notice to the surety, was authorized to render against it the same decree rendered against the principal. The circumstances surrounding the execution of the bond, the state of the cause when the bond was executed, and the subsequent proceedings in the cause leading up to the entry of the decree appealed from, including the allegations in the complaint, and supplemental complaint, and those portions of the findings, conclusions and decree of the court pertinent to the liability of the appellant, all appear in the printed transcript, and are referred to somewhat at length in the statement of facts contained in this brief.

1. The proceedings in the cause resulted in findings and a decree fixing the liability of the mortgagor. Indeed, that was the primary purpose of the suit, because, until the liability of the mortgagor was established, the mortgaged property could not be appropriated to pay the debt, or a deficiency judgment awarded. The contract of appellant was to pay any judgment that might be rendered in the cause. This is the construction placed upon it by counsel for appellant in their brief on page 23, where it is said:

"That bond was an agreement to pay any judgment that might be rendered in the cause."

Thus the liability assumed by the defendant was coextensive with that which might be imposed upon the mortgagor by the decree entered in the cause. As the purpose of the suit was to ascertain the liability of the principal and to prescribe the manner of its enforcement, the decree necessarily operated to determine and fix such liability for all purposes, both as against the mortgagor and the appellant. No further proceedings were necessary, or authorized, to determine the extent of the liability of appellant. The decree was entered after notice to appellant that the entry of such decree would be moved at the time and place fixed in the notice.

2. In many states the character of statutory bonds, and the manner of enforcing the liability of the surety, are fixed by statute. Decisions from such jurisdictions are valueless as precedents, either upon the one side or the other in this case, for two reasons: first, there is here no applicable statute; and, second, the instrument here involved is not a statutory bond. There are many adjudicated cases which, we think, fully sustain the practice followed in the present case, and clearly establish the validity of the judgment appealed from. And, without further discussion, we will now refer to, and discuss, some of these decisions.

In some of the very early federal decisions it was

doubted whether, in the absence of express statutory authority, judgment could be summarily entered against a surety in the same cause in which the bond was given, the view being then entertained that the remedy was by an independent action at law. These early decisions were, however, in effect disapproved by the Supreme Court of the United States in Russell v. Farley, 105 U. S. 433; 23 Law Ed. 1060. And since that time the federal courts have quite uniformly asserted and exercised the power of entering judgment summarily in the principal case, against the surety.

In Brown v. Northwestern Mutual Life Ins. Co., 119 Fed. 149, the Court of Appeals had before it an appeal by a surety from a summary judgment rendered in a foreclosure suit against the surety on a supersedeas bond, given on appeal from an order confirming sale under a decree of foreclosure. The judgment was sustained by that court, and was affirmed upon appeal to the Supreme Court, under the title of, "Woolworth v. Northwestern Mutual Life Ins. Co., 185 U. S. 354; 46 Law Ed. 945."

Tyler Mines Co. v. Last Chance Mining Co., 90 Fed. 15, is a decision by this court. It was a suit in equity to restrain the defendant from working certain mines, and for an accounting. Plaintiffs, at the time of filing of the bill, obtained a temporary injunction, and executed the usual bond. Thereafter a decree was rendered for defendants, upon reference the damages were

ascertained, and summary judgment was ordered and entered against the plaintiff and the sureties upon the bond. In an opinion rendered by Judge Ross, concurred in by Judges Gilbert and Hawley, this practice was approved, and the judgment sustained. The court, among other things, saying:

"On behalf of the sureties on the bond, it was contended that no decree could be rendered against them because they were not parties to the suit; in support of which position Bein v. Heath, 12 How. 168, is cited and relied on, in which case Chief Justice Taney made this remark:

"A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction."

"In the case of Russell v. Farley, 105 U. S. 433, 445, the court reviewed the case of Bein v. Heath, as well as the decision of Mr. Justice Curtis in Merryfield v. Jones, 2 Curt. 306, Fed. Cas. No. 9, 486, and said:

"Upon a careful examination, we are not satisfied that they furnish any good authority for

disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England), nor on the existence of an express law or rule of the court (as adopted in some of the states) that the damages may be ascertained, by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But, while the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet, if it has that power, it is in its discretion to exercise it or to leave the parties to an action at law. No

doubt, in many cases, the latter course would be the more suitable and convenient one."

"Since the intimation in Russell v. Farley it has been acted on by the federal courts in at least three cases. Lea v. Deakin, 13 Fed. 514; Coosaw Min. Co. v. Farmers' Min. Co. 51 Fed. 107; Lehman v. McQuown, 31 Fed. 138. See also 2 Beach, Mod. Eq. Prac. Sec. 770. Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error."

In the case just quoted from, it seems that no notice was given to the sureties of the proceedings before the Master to ascertain the amount of damages, or that judgment would be entered against them. Concerning this phase of the case the court said:

"Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error."

In the case at bar notice was given. In their brief counsel question the sufficiency of such notice. Whether or not notice was necessary, or whether the notice given was defective, are questions not raised by the assignments of error.

In Gordon v. Third Nat. Bank, 56 Fed. 790, the Circuit Court of Appeals for the Fifth Circuit, had be-

fore it a summary judgment entered against the sureties on a supersedeas bond. No federal statute, or rule, dealt with this matter. Judgment was entered after notice to the sureties. It was contended that the sureties were not parties to the suit, and that the only remedy upon the bond was an independent action at law. This contention was denied by the Circuit Court of Appeals, as well as by the subordinate federal court. And it was in substance held, that the bond was, in effect, a contract imposing upon the sureties a liability as broad as that of the principal; that the entry of judgment against the principal, from its very nature, fixed the extent of the liability of the surety; that no reference, or other inquiry, was necessary to determine the liability of the sureties, and that it was proper, upon notice, to enter judgment upon the bond in the cause in which it was given.

In Empire State etc., Company v. Hanley, 136 Fed. 99-103, this court, in a decision rendered by Judge Gilbert, and concurred in by Judge Ross and Morrow, approved the practice adopted, and the doctrine announced in the Gordon case, supra; and quoted with approval the following language of Mr. Justice Miller in Blossom v. Railroad Co., 1 Wall. 655; 17 Law Ed. 673:

> "Sureties signing appeal bonds, stay bonds, delivery bonds, and receiptors under writs of attachment, become quasi parties to the proceedings, and subject themselves to the jurisdiction of the court, so that summary judgments may be rendered on their bonds or recognizances."

In Perry v. Tacoma Mill Co., 152 Fed. 115, a decision by this court, it was contended that summary judgment entered against the sureties upon the bond given in the cause, in the course of litigation, was unauthorized. The suit was brought to foreclose a mortgage executed to Tacoma Mill Company, plaintiff in the court below, and appellee in this court. The following is a statement of certain of the facts taken from the decision of this court:

> "A final decree of foreclosure was entered therein October 3rd, 1904, in and by which judgment in the aggregate amount of $19,865.57 was given against George Lawler, and George Lawler doing business as the Sunset Lumber Company, and foreclosing the mortgage, which was thereby adjudged to cover:" (Here follows a description of the property)

In passing, it may be here remarked that the form of the decree entered was similar to the form of the decree entered in the case at bar. The property covered by the mortgage consisted of a small sawmill plant, including engines, boilers, saws, tools, tram-ways, portable houses for workmen, portable cook houses, certain livestock, etc., mostly personal property. One, Perry, intervened in the case, and set us as a defense that he was the owner of a large part of the property, adjudged to be covered by the mortgage, and that the mortgagors had no authority to encumber it. After the decree was entered the prop-

erty was seized and held for sale by an officer of the court, charged with the duty of making the sale. Perry took an appeal. No application was made by Perry to the court for a release of the property; but he undertook to stay the decree, and to cause a return of the property to him, by a bond conditioned that he, Perry, would hold the property "subject to the proper order and decree that may be finally entered in said cause," etc. The decree was affirmed on appeal. The amount of the bond was $12,000.00, somewhat less than the amount of the decree. While the appeal was pending the property was destroyed by fire. It will be noted that the bond was not a statutory bond, but, like the one in case at bar, was given during the progress of the litigation for the purpose of securing to the obligor some advantage and benefit. Upon the coming down of the mandate, the Tacoma Mill Company, plaintiff in the foreclosure suit, moved for summary judgment against the sureties upon the bond for the amount of the penalty of the bond, to-wit: $12,000.00. Such a judgment was entered, and upon appeal therefrom by the sureties, was affirmed by this court.

Cimiotti Unhairing Co. v. American Fur Refining Co., 158 Fed. 171-174, is interesting and in point. It was a suit for an injunction to restrain an alleged infringement. A temporary injunction was ordered upon condition that the complainants give bond in the sum of $15,000.00, which bond was filed and approved. On final hearing the Circuit Court adjudged an infringement, and granted a permanent injunction. The Court

of Appeals reversed the decree, and its decision was affirmed by the Supreme Court. The mandate coming down, the Circuit Court made an order directing the Master to take proofs and ascertain and report to the court what damages the defendants had suffered. The surety upon the injunction bond was not given notice of any of these proceedings, and, so far as the record discloses, took no part therein. The Master found and reported damages in the sum of $18,406.70; the court modified this amount somewhat, but affirmed the report in an amount exceeding the penalty of the bond. The defendants then moved for judgment against the complainants for the amount of the damages, and for judgment against the surety for the amount of the bond, to-wit: $15,000.00. This, the court allowed, citing as authority, Tyler Mining Co. v. Last Chance Mining Co. supra; Empire State, etc. Co. v. Hanley, supra, two decisions by this court, and Russell v. Farley, supra, a decision by the Supreme Court. Other Federal decisions supporting the same view are:

McCloskey v. Barr, 79 Fed. 408.
Coosaw Min. Co. v. Farmers' Min. Co., 51 Fed. 107.
Third Nat. Bank v. Gordon, 53 Fed. 471.

3. The same rule of practice has been repeatedly approved and followed by state courts in the absence of express statutory provisions regulating the mode of enforcing liability of sureties upon bonds given in the course of judicial proceedings.

Sharp v. Schmidt & Zeigler, 62 Tex. 263, was a suit for injunction. Temporary injunction issued and bond was given. The defendants filed an answer denying the equities of the bill, and pleaded by way of reconvention, damages resulting from the issuance of the injunction. The answer and counter-claim was not served upon, or brought to the notice of the sureties upon the injunction bond. The plaintiff failed to sustain the appeal, and judgment was given against him in favor of the defendants; and likewise judgment was entered summarily against the sureties upon the bond. The action of the court was not predicated upon any statute or rule, so far as disclosed by the opinion of the Supreme Court. Contending that judgment could not be entered against them in this way, and that their liability must be established in an independent action upon the bond, the sureties appealed. The judgment was sustained, the court among other things saying:

> "The sureties upon the injunction bond were practically parties to the suit, and liable to have any judgment rendered against them which was authorized by the pleadings and proofs, at least to the extent of their bond."

Corbett v. Pond, 10 App. D. C. 17-28, was a replevin action. A bond was filed. There was no statute regulating the manner of enforcing the liability of the sureties on the bond. A money judgment was given against the principal in the bond, and likewise

against the surety, and in sustaining this judgment the court said:

> "The purpose of this undertaking was, like that of a recognizance, to introduce a new party into the proceedings, who should become bound by the judgment, if judgment should be against the plaintiff, and liable for its performance."

And the following cases directly, or by analogy, all sustain the view that, in the case at bar, the court was authorized upon summary application, to enter judgment against the appellant:

Hathaway v. Weeks, 34 Mich. 237-244.
Council v. Averett, 90 N. C. 168.
Smith v. Wilson, 18 Tex. Civ. App. 24; 44 S. W. 556.
Black v. Caruthers, 4 Humph. (25 Tenn.) 87.
Wanters v. VanHorst, 28 N. J. Eq. 104 (1 Stew).

Easton v. N. Y. etc., Ry. Co., 30 N. J. Eq. 238 (3 Stew).
Fears v. Riley, 147 Mo. 453-456.

4. Under Point III, counsel for appellant cite a number of cases to their contention that in the present case, an independent action was necessary to enforce the

liability of the surety; or, at least ancillary proceedings were necessary to that end. We think that a brief examination of these cases will show that none of them in point in support of this view, and that two or three of them announce, arguendo, approval of the practice followed in the case at bar. These cases will now be discussed:

Beall v. New Mexico, 16 Wall. 535; 21 Law Ed. 292, involved the constitutionality of a territorial act authorizing judgment against sureties on an appeal bond, as well as against the appellants, in case of affirmance. The act was sustained. Some things the court said in its opinion are instructive. Said the court:

> "A party who enters his name as surety on an appeal bond, does it with full knowledge of the responsibility incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal. If judgment may be thus entered on a recognizance, and against stipulators in admiralty, we see no reason in the nature of things, or in the provisions of the constitution, why this effect should not be given to appeal bonds in other actions, if the legislature deems it expedient. No fundamental constitutional principle is involved; no fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except mere delay) can be subserved by compelling

> the appellees to bring a separate action on the appeal bond."

Babbitt v. Shields, 101 U. S., 25 Law Ed. 820, was an action upon an appeal bond. The propriety of the practice adopted in the instant case was not involved directly or collaterally, and no mention is made of such matter in the course of the opinion. The court did, however, say that the entry of judgment against the principal definitely fixed the liability of the sureties; that that judgment was conclusive upon the sureties; that it was not necessary to issue execution against the principal, or take any further step or proceeding whatsoever, because the entry of judgment charged the sureties with a liability as broad as the liability of the principal. And so it is in the present case, the entry of judgment against the principal fixed beyond dispute, the liability of the appellant. No further inquiry was necessary. Its contract was to pay any judgment that might be rendered in the cause; and, as said by the Supreme Court in Beall v. New Mexico, supra,

> "No fact is to be ascertained for the purpose of rendering the sureties liable, which is not apparent in the record itself; no object (except mere delay) can be subserved by compelling the appellees to bring a separate action on the appeal bond."

Smith v. Gaines, 93 U. S. 341; 23 Law Ed. 901, involved the application of the provisions of the Code of

Louisiana to the liability of sureties upon an appeal bond. These statutory provisions authorized summary judgment against sureties upon a supersedeas bond. No question was involved or discussed pertinent to the case at Bar.

Crocker v. Currier, 65 Wis. 667, does not deal with the question of judicial bonds, or the liability of sureties, in any manner whatever. The only question considered by the Wisconsin court, which might have any bearing upon any matter discussed in the brief of counsel for appellant, was the proper construction, under the statutes of that state, of a decree for the foreclosure of a lien.

Earl v. Cureton, 13 S. C. 19 (cited in counsel's brief as *14* C. S. 19), reversed a summary judgment entered against a surety. The opinion is very brief, and recites that no notice was given the surety that judgment would be asked, and no motion made and brought to the attention of the surety. Without discussion, or citation of authorities, the court held that the judgment was erroneous, and set it aside.

Leslie v. Brown, 32 C. C. A. 556; 90 Fed. 171, is a decision by the Circuit Court of Appeals, for the Sixth Circuit. It was an independent action at law upon a bond given in an injunction suit. A demurrer to the complaint was sustained by the lower court; and, it seems, among other things, to have been contended that no action at law could be brought, and that the remedy was

by summary proceedings in an injunction suit for judgment against the sureties. The Court of Appeals sustained the right to sue at law, and among other things said:

> "It is settled by the cases of Russell v. Farley, 105, U. S. 433, and Meyers v. Block, 120 U. S. 207, 7 Sup. Ct. 525, that the court which grants an injunction, and takes an injunction bond, to save the defendant from loss caused thereby, may, in an ancillary proceeding, summarily enforce this bond against the sureties; but in such a proceeding, at least when the amount of recovery is uncertain, the sureties must have notice and their day in court before the amount of damage is fixed against them. The amount of recovery under this bond was not certain."

It may be here observed, that Tyler Min. Co. v. Last Chance Min. Co., decided by this court, in which summary judgment against sureties was sustained, the damages being certain, and in which the court said: "Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error," was decided about the same time, and is reported in the same volume.

Terry v. Robinson, 122 Fed. 725, was an injunction suit, in which a temporary injunction was issued and bond filed. The bond was in the sum of $500.00. The

injunction was dissolved, and a reference was made to ascertain the damage, which was found by a special Master to be $2670.57. There were exceptional circumstances in the case. On the theory that the injunction was maliciously sued out, and that in such case the sureties were liable for the full damage, even though it exceeded the penalty of the bond, application was made for the entry of judgment against the surety for the full amount of the bond. No notice was given to the sureties. In the course of the opinion the court said, that the sureties had no notice, and judgment could not be entered against them. The court also set aside the entire award of damages made by the Master, and taxed all costs of reference against the defendants in the injunction suit. Nothing in the case, in view of the facts, is in point here.

These are all of the cases cited by appellant under Point III, in support of its claim that the judgment entered against the appellant is wholly void, because it was not a party to the cause. In the course of the argument, there is referred to, and quoted from a decision by the Supreme Court of Oregon—Holbrook v. Investment Co., 32 Ore. 104-106. Let us now examine this case and see whether or not it supports the views of appellant. Holbrook and another obtained a judgment against the Investment Company in the Circuit Court of Multnomah County. The defendant appealed, giving a supersedeas bond. Pursuant to the provisions of the Oregon Code, and within ten days after the appeal was perfected, Holbrook et al. filed an undertaking conditioned that

if the judgment should be reversed, or modified, they and their sureties would make such restitution as the appellate court might direct,and thereupon obtained execution upon the judgment, notwithstanding the appeal, and about half of the judgment was collected. The Supreme Court reversed the judgment and entered an order against the principals and the sureties upon their restitution undertaking, to restore to the defendant the money so collected. The sureties made application to the Supreme Court to be relieved from such order, and to have it set aside, on the ground, mainly, that a summary order or judgment of that kind could not be entered against them. There was no statute authorizing such an order or judgment, to be entered by the Supreme Court. There was a statute authorizing the entry of judgment against the principal and the sureties on a bond to stay the enforcement of an ordinary law judgment pending an appeal, but this was not that kind of a bond. The only statutory provisions relating to a bond such as was before the Supreme Court, were as follows:

> "If the judgment or decree has been given in an action or suit upon contract, notwithstanding an appeal and undertaking for the stay of proceedings, the respondent may proceed to enforce such judgment or decree, if, within ten days from the time the appeal is perfected, he file with the Clerk an undertaking, with one or more sureties, to the effect that if the judgment or decree be reversed or modi-

fied, the respondent will make such restitution as the appellate court may direct."

Nothing in these provisions directly authorized the entry of summary judgment against the sureties. The obligation was to make such restitution as the court might direct. The obligation of the appellant in the case at bar was to pay any judgment that might be rendered in the cause. Discussing these statutory provisions and the general policy of the law, the Oregon Supreme Court said:

"It will be observed that this section does not, in direct terms, confer upon this court authority to render judgment against the sureties on such an undertaking, when the judgment or decree is reversed or modified, but we think the power is fairly implied therefrom, and particularly so when the general policy of the law, as manifested by sections 541 and 546 is considered. The appellant is required to include in the transcript a certificate of the undertaking executed by the respondent, the names of the sureties, and the amount thereof, if the same is specified (section 541, subdivision 1, Hill's Ann. Laws); and it would seem from this provision that the sureties, by signing such an undertaking, became parties to the judgment or decree upon the reversal or modification of which they agree to make such restitution as may be directed, thereby authorizing this court to render judgment against

> them in accordance with the conditions stated in such certificate. * * * It amounts to this: If the judgment is affirmed, the respondent is entitled to have the judgment entered against the sureties on the appeal; if it is reversed, the appellant is entitled, if it has been enforced, to have a judgment of restitution entered against the sureties upon the counter-undertaking; and in case it has been enforced, and the judgment is affirmed, the prevailing party would only be entitled to judgment for the costs upon appeal."

It is clear there was no statute authorizing such a judgment, but the liability of the sureties was fixed by the decision of the Supreme Court, fixing the amount to be restored by the principal in the bond. By signing the bond, and not by force of any direct statutory provisions, the sureties became parties to the cause. The character of the liability assumed by the sureties, and the general policy of the law, were held to authorize the court to enter judgment as of course, and without notice, against the sureties for the amount of the liability of the principal. So in the case at bar, appellant by its contract, fixed its liability, which was, in the language of its counsel, "a contract to pay any judgment that might be rendered in the cause." When it signed the bond it made itself a party to the suit, the very purpose of which was to fix the liability of the defendant and crystallize that liability into the very judgment appellant agreed to pay.

5. Some complaint is made that the notice given to appellant, of the time and place when judgment against it would be applied for, was inadequate. There is no pretense that appellant did not have notice and opportunity to be heard. There is no suggestion that appellant wished to be heard upon the application for judgment. The trial court acquired jurisdiction over appellant when it executed and filed its bond in the cause. We, of course, contend that the notice given was ample in form and gave a sufficient time to appellant to appear and object, if it wished to object, to the entry of judgment against it. But if the notice was defective in form, or if it should have given the appellant longer time within which to prepare for the hearing, those are matters not going to the jurisdiction of the trial court. The proper place to move was in the trial court, either to set aside the service of notice, or for the dismissal of the motion for the entry of judgment against it, or for more time within which to appear, move, object or take any other step it deemed expedient. And if in connection with any of such proceedings appellant deemed itself aggrieved by any action, or ruling, of the court, and wished to have such ruling or action reviewed, it should have duly excepted to and made such alleged prejudicial ruling or action, the basis of appropriate assignment of error here. The objection to the form of the notice is highly technical, and like most of the other questions argued in appellant's brief evidently was not thought of when the appeal was taken and the assignment of errors prepared and filed

Finally, this objection may be disposed of with the following quotation from the opinion of this court applicable to the facts before the court then, and peculiarly apt here, viz.:

> "Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error."

Tyler Mines Co. v. Last Chance Mines Co., supra.

It is respectfully submitted that the decree appealed from should be affirmed.

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